

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

KATHLEEN LYONS and)	
RANDY LYONS,)	
)	
Plaintiffs)	
)	
v.)	Civil No. 95-0194-B
)	
JESSE BROWN, et al.,)	
)	
Defendants)	

ORDER ON SCOPE CERTIFICATION

This matter is before the Court on remand from the First Circuit Court of Appeals. On October 21, 1998, the Court of Appeals issued an Order vacating this Court's Order striking the Government's certification that, as to only a portion of Plaintiffs' Complaint, Defendant Pathak was acting within the scope of his employment. The Court of Appeals directed this Court to apply the scope test to "acts or incidents," rather than to the Complaint as a whole.

The Court of Appeals also explained that Plaintiff would have the opportunity to challenge the certification by proving any facts necessary to undermine the Government's characterization of the conduct as "work-related." Doing so, however, would expose Plaintiff to the risk that this Court would make an adverse factual finding that would then be binding upon Plaintiff at trial. In light of that risk,

Plaintiff thereafter elected not to challenge the Government's certification. Accordingly, the following paragraphs are certified by virtue of the Government's original certification: 52, 53, 55, 59, 61, 69, 88, 91, 115, 129, 130, 131, 132, 133, 134, 135, 140, 142, 145, 147, 148.

A. *Allegations about others.*

The Court finds the following paragraphs are not certifiable because they allege conduct by persons other than Defendant Pathak or provide background information only, or are legal conclusions rather than allegations of fact: 1-15, 19, 22, 27, 30, 32, 34, 38, 43, 46, 50, 54, 56, 57, 58, 60, 64, 66, 67, 68, 81, 84, 86, 87, 92, 93, 94, 95, 96, 98, 99, 100, 101, 102, 105, 106, 107, 108, 109, 110, 112, 113, 116, 117, 120, 121, 122, 123, 124, 125, 126, 127, 128, 136, 137, 138, 139, 141, 143, 144, 146, 149, 150, 152, 153, 154, 159 - 240.¹

B. *Allegations not subject to challenge.*

Defendant Pathak does not challenge the Government's decision not to scope certify the following paragraphs: 17, 23, 26, 28, 31, 35, 36, 39, 40, 41, 42, 44, 45, 47, 48, 49, 51, 77, 82, 103, 104, 111, 114, 155, 156.

¹ Paragraph 131, alleging that "[f]rom November, 1994 through the present, Ms. Lyons has kept management updated about Dr. Pathak's behavior and the risk to patient care it has created, but nothing has changed," would have been included in this section but for the fact that the Government certified the paragraph, and the certification has not been challenged.

C. Allegations related to certified conduct.

The next issue involves paragraphs alleging motivations for the certified conduct which, if true, would have brought the conduct *outside* the scope of employment. The appellate court had earlier satisfied itself that trial courts could resolve factual disputes regarding motivation when the Government's certification admitted the conduct, but denied related allegations of motivation. *Wood v. United States*, 995 F.2d 1122, 1129 (1st Cir. 1993) (citing *Nasuti v. Scannell*, 906 F.2d 802 (1st Cir. 1990)). Indeed this Court could do so, if a party sought to raise the issue or the Court's subject matter jurisdiction were threatened such that the issue could be raised *sua sponte*. See *Nasuti*, 906 F.2d at 810 (noting the district court's authority under Article III of the Constitution to resolve the issue when subject matter jurisdiction depends upon its resolution). In this case, however, the only party who might have sought a ruling elected not to do so, apparently concerned that a contrary ruling on motivation would render the certified conduct irrelevant to "pattern, motivation or anything else pertinent to imposing liability on the employee for conduct that has *not* been certified." Slip. Op. at 9.

However, the appellate court did present the parties with a strategy decision when it stated that a party seeking to challenge the certification would face the risk of an adverse factual finding being binding at trial. Plaintiff's choice not to accept

that risk leaves Defendant in the position of possibly having to challenge Plaintiff's evidence of motivation before the jury, subject to the Court's discretion under Federal Rule of Evidence 404(b).

The Court is satisfied, however, that Plaintiff may not base her claim on motivation alone, once the conduct itself has been certified. The Court further understands the appellate court's ruling that certification is to occur as to "acts or incidents" to appropriately suggest that all paragraphs describing an "incident" should be included in the certification. Accordingly, the Court agrees with Defendant that the following paragraphs should be included: 62, 63, 70, 71, 89, 90, 118, 119.

D. "The Chicago Trip."

Defendant argues that paragraphs 16, 18, 20, 21, 24, 25, 29, 33, and 37, regarding the parties' trip to Chicago for a conference, should all be included within the scope certification. The Court agrees only as to paragraph 16. Defendant has not met his burden of persuading the Court that the remaining paragraphs, involving room assignments, Defendant carrying Plaintiff's baggage, and who would pay for dinner, allege conduct within the scope of Defendant's work. Defendant's arguments as to why the paragraphs should be included are perhaps persuasive on the question whether the conduct was offensive, and those arguments may certainly be made

during closing arguments. Paragraph 16 will be included in the scope certification; paragraphs 18, 20, 21, 24, 25, 29, 33, and 37 will not.

E. Paragraphs 65 and 157.

Defendant argues these allegations set forth statements made during the course of discussions regarding the differences between these co-employees, and are solely work-related. The Court agrees as to paragraph 65, but finds paragraph 157 too general to determine whether the statements included within the allegation are work-related. Paragraph 65 will be certified and paragraph 157 will not.

F. The September 8 Meeting.

Defendant asserts that Plaintiff's allegations regarding the September 8 meeting should be scope certified because Defendant sought the meeting for the purpose of resolving differences that had been affecting the parties' work relationship. The Court is satisfied, having heard much evidence regarding this meeting, that Defendant's intent was to repair his relationship with Plaintiff so they could resume working together. Whether this was done in the most appropriate manner possible is open to question, but does not affect in this case our determination that the conduct was work related. Restatement (Second) of Agency § 230. Paragraphs 72 through 76 are properly scope certified.

G. The September, 1994 nephrology conference.

The Court is also persuaded that Defendant's invitation to Plaintiff to attend a nephrology conference with him (paragraph 78) occurred within the scope of his employment. The Court is not persuaded, however, that the conversation alleged in paragraphs 79 and 80 falls into that category. The Court reaches that conclusion for the reason that Defendant departed from his intended work for that day in order to speak with Plaintiff. Paragraph 78 will be included in the certification; paragraphs 79 and 80 will not.

H. The Birthday Hug.

The Court views Defendant's giving Plaintiff a birthday hug (paragraph 83) as nothing more than his wishing her a "happy birthday" (paragraph 82). The Court is satisfied that Defendant's intent was to comply with what was, in his view, the manner in which employees at Togus conducted themselves with respect to birthdays. The only persuasive evidence on this issue shows that he did so in an attempt, albeit perhaps clumsy, to maintain a tolerable work relationship with Plaintiff. Paragraph 83 will be included in the scope certification.

I. Nurse Daigle's career aspirations.

The Court cannot characterize Defendant's personal conversation with Nurse Daigle about her career aspirations as motivated by a desire to serve his employer. Paragraph 85 is not certifiable.

J. Defendant's mailman message.

The Court is not persuaded by Defendant's argument that the mailman message was an attempt to discuss differences between employees. The evidence shows simply that Defendant became frustrated by his perception that the other employees were turning against him, and he struck out at them through the mailman message. The conduct alleged in paragraph 97 did not occur within the scope of his employment at Togus.

K. Paragraph 151.

The Court is satisfied, in light of the evidence showing the confidential nature of the research project the parties had been involved in and the similarity in subject matter between that research and the poster presentation, that any expression of concern by Defendant about Plaintiff making that presentation was made in the course of his employment with the VA. Paragraph 151 will be included in the scope certification.

K. Paragraph 158.

The Court concludes that paragraph 158 is too general to determine whether the statements included within the allegation are work-related.

Conclusion

Accordingly, the Government's Amended Scope Certification, filed March 24, 1997, is hereby AMENDED to include the following paragraphs of Plaintiff's Complaint: 16, 52, 53, 55, 59, 61-63, 65, 69-76, 78, 83, 88-91, 115, 118, 119, 129-135, 140, 142, 145, 147, 148, 151.

The following paragraphs now constitute the entirety of Plaintiff's Complaint: 1-15, 17-51, 54, 56-58, 60, 64, 66-68, 77, 79-82, 84-87, 92-114, 116, 117, 120-128, 136-139, 141, 143, 144, 146, 149, 150, 152-240. Dispositive motions necessitated by this Order shall be filed no later than October 15, 1999.²

SO ORDERED.

Eugene W. Beaulieu
U.S. Magistrate Judge

Dated on September 21, 1999.

² The Motion deadline is hereby ENLARGED to that date as to all parties.